NATIONAL SECURITY AND HUMAN RIGHTS

Semester 2, 2016

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<u>Class 1 – Overview of the Course; Sources of Australia's National Security Laws</u>

Administration Matters:
- Class Participation (20%), In-Class test (10%), Research Essay (30%)
    - **Test example** - The definition of terrorism include a motive element?
    - **Test example** - Should civil methods be used as an alternative to criminal
        - Straight-forward questions (discussed in class) intended to show an opinion/argument backed up by evidence
    - PREPARE ANSWERS ON BRAOD DISCUSSION QUESTIONS FROM CLASS
- Research essay abstract – By Tuesday 16th August
- Research Essay questions – Go through the list of topics and do some surface reading
    - Best essays have a topical anchor (why it being discussed – eg: current prominence in the last few years)
        - Try not to be too topical as the law may change over the period of the semester
    - Link between media and terrorism laws?
    - Preparatory offences – When is it ok to remove and/or limit human liberties?
        - What have we/should have we learnt/not learnt from the Mohammed Haneef case?
        - Minority groups? Privacy rights?

POTENTIAL ESSAY - Preparatory offences and especially incarceration on suspicion →
Balance between protecting the community and ensuring that individual liberties are unjustifiably removed
→ Constitutional validity of these laws?

Inside Australia's Anti-Terrorism Laws and Trials – Introduction:
- Australian anti-terrorism laws have only been in existence since the attacks of September 11 2001
    - Prior to this there were no national laws criminalising terrorism or conferring special powers and procedures upon police, intelligence agencies and courts to deal with terrorism cases
    - By the end of 2014, 64 separate pieces of anti-terrorism legislation had become law
        - 42 people have been charged to date (2015 published book)
- The dominant principle underpinning the anti-terrorism regime is that authorities should have sufficient powers to prevent would-be terrorists before they can inflict harm upon the community
- **ISSUE** – Striking the right balance between affording the accused a fair trial, while also protecting the confidentiality of surveillance techniques and sources, has been a problem confronted by courts around the world
- **TREND** – Australian governments have found it much more palatable to increase rather than limit or remove national security measures, tending to ignore reviews which recommend the latter course

- Australian government – "The threat of terrorism… has become a persistent and permanent feature of Australia's security environment"
- **OPINION** – We should never assume that the curtailment of liberty delivers, as a matter of practical operation, a valuable enhancement of national security
  - The retainment of the polity and freedoms enjoyed by Australian's is important considering the potential for national security laws to inhibit this

Timeline of Australian Anti-Terrorism Legislation and Major Reviews:
- **March 2002** – Australia's first package of anti-terrorism legislation was introduced in the wake of the 9/11 terrorist attacks
- **December 2002** – The *Terrorism (Commonwealth Powers) Act 2002* is enacted by each of the Stated to refer certain matters relating to terrorist acts to the Federal Parliament so as to enable it to make laws about those matters
- **June 2003** – Bill passed by Parliament giving ASIO the ability to coercively question and detain for up to 7 days a non-suspect citizen
- **June 2004** – The period in which a suspect can be interrogated by the AFP without charge is increased from 4 to 24 hours
- **October 2014** – The first part of the legislative response to the problem of Australians travelling overseas to fight with terrorist organisations was passed by Parliament
- **December 2015** – COAG agreed to back new laws allowing convicted terrorists who have served their sentence to remain imprisoned if they still pose a risk
- **May 2016** – NSW Bill introduced to allow a court to approve detention and questioning by the police for up to 14 days without charge

Timeline of Major Terrorism Incidents – 1970s to 2009:
- **1978** – Bombing outside Hilton Hotel, Sydney
- **1980** – Assination of Turkish Consul-General and his bodyguard, Sydney
- **2001** – US September 11 Attacks
- **2002** – Bail nightclub bombings
- **2005** – London underground bombing

Timeline of Major Terrorism incidents from 2013-2015:
- **September 2014** – Significant operations to disrupt terrorism networks in Melbourne, Sydney and Brisbane
- **13 September 2014** – Australia's terror threat level is raised from medium to high ('terrorism attack is likely"
- **2 October 2014** – 15 year old boy shot dead a police accountant, Curtis Cheng, outside the Parramatta Police Headquarters
- **15 December 2015** – Man Haron Monis takes 18 hostages at the Lindt café

Sources of Australian Anti-Terrorism Law:
- We now have only 70 substantive pieces of anti-terrorism legislation → First was not enacted until post 9/11/2001

The Nature of the Threat:
- Official threat assessments were initially secret → They were used by government to inform policies surrounding terrorism
  - 2015 review recommended that it was obsolete and confusing to have two terrorism alert systems (one pubic and one private for government)
    - New Terrorist Threat Advisory System introduced November 2015
- Difficult to get the right balance between the need for secrecy to avoid unsuccessful investigation and the need to hold the government to account (which is achieved through obtaining information that justifies governmental decisions)
- Terrorism attacks are <u>more politically motivated than religiously</u>
  - Link to Islam is easy as significant proportions of Middle Eastern attackers (who do so as a response to Western invasion on their lands) are Islamic and small proportions claim allegiance to Islam

Stakeholders in the threat assessment – What groups might be interested (or have a desire to change) terrorism threat assessments?
- Judiciary – Judicial notice of the threat assessment necessary to challenge
- Tourism Industry
- Insurance Industry
- ASIO/Defence Industry (Army)
- Litigants/People charge with terrorism offences
- Media
- Police
- Parliamentarians – Parliamentary Joint Committee on Intelligence & Security (PJCIS)
- Minority groups and their advocacy groups (eg: AMCRAM)
- Religious groups
- Human rights/civil liberty groups
- General public
- International allies/groups
- Terrorist groups
- Stock market
- Academics
- Immigration and border authorities
- Independent National Security Legislation monitor (INSLM)

Edward Santow and George Williams, 'Terrorism Threat Assessments: Problems of Constitutional Law and Government Accountability' (2012) 23(1) *Public Law Review* **33-49.**
<u>Terrorism threat assessments in the public domain:</u>
- Publicly available terrorism threat assessments provide the public with a general appraisal of the threat of terrorism, thereby allowing individuals to make better-

informed decisions as to matters that may put them at risk in the event of a terrorist attack
- Terrorism threat assessments are used by governments in litigation to defend the expansion of legislative and executive power beyond what might in other circumstances be seen as unconstitutional
  - In parliamentary debate, assessments are used to justify the enactment of otherwise extreme measures that impact on civil liberties
- Assessments are often vague and can be impossible to verify independently
- **Notorious facts and unsubstantiated assertions** – Should not be able to make claims which are considered judicial notice without provided supporting evidence
- **Official government reports** – Redacting sensitive material or providing a mere summary of a report should not be considered enough to justify later use of such a report in court
- **Terrorism threat alert systems** – The government is able to set the terrorism alert system as low, medium, high or extreme without any statutory regime that empowers the decision-making process
  - Possible that a high threat alert might be relied upon to justify the suspension of important constitutional safeguards
- **Problems with the current practice**:
  - Australia, along with the UK and US, has not established legislative standards to inject clarity, transparency and rigour into the process of assessing terrorism threats
    - Courts and legislators are hampered from independently deciding whether the government's claims are accurate
  - The administrative decisions that underpin official government terrorism threat level assessments may not be subject to any formal independent review
  - There is no legislative stipulation as to the matters that the executive government must take into account or the manner in which it should exercise its power to issue terrorism threat assessments
    - No government has sought to explain how terrorism level assessments might be used by a court or in a legislative process

Constitutional consequences of terrorism threat level assessments:
- The use of terrorism level threat assessments extends into the constitutional realm through the expansion of government power, and the ability to impact upon the protection of constitutional rights
- The constitution provides no specific power to make counter-terrorism laws → Government has relied on the defence power in s 51(vi) (confirmed in *Thomas v Mowbray*)
  - Purposive power which permits the Parliament to legislate with respect to any matter deemed necessary *for the purpose of* defending Australia

- - Elastic power which expands, contracts and otherwise contorts itself to accommodate the specific threat facing Australia at any moment
    - **Issue** – The court's heavy reliance on taking notice of the existence of a major war ('war on terrorism')
    - **Issue** – The reliability of many of the terrorism threat level assessments is simultaneously questionable and almost impossible to test
      - Assessments provide questionable evidence because they usually consist of broad assertions regarding the threat of terrorism
    - **Issue** – The fact that terrorism level threat assessments can be the subject of wildly diverging interpretations suggests that they are of limited evidentiary value (yet the High Court relies heavily on such evidence)
- **Constitutional human rights obligations** - Where the defence power is enlivened, there is potential for Parliament to pass laws that either themselves infringe on individual liberties, or confer a very broad power on the executive that allows it to make decisions without reference to conventional restrictions that help protect individual rights
  - The door to greater governmental intrusion on individual liberty is existent

Reform of Terrorism Threat Assessments:
- The degree of required secrecy and the sensitive nature of the material is believed to be not by themselves sufficient reasons to reject a higher degree of accountability and scrutiny when it comes to the making of terrorism threat assessments
- The making of terrorism threat assessments in Australia should be put on a more appropriate footing
  - In particular, it ought to be subject to a higher degree of accountability
  - The advent of a statutory scheme to regulate the creation, publication and use of terrorism threat assessments could enhance public accountability in the formation of these assessments and provide clearer rules regarding how they should be used
    - A balance needs to be struck between secrecy and the accountability measures that should apply
    - A statutory scheme should subject terrorism threat assessments to more rigorous scrutiny using political accountability mechanisms

Christopher Michaelsen, "Terrorism in Australia: An Inflated Threat" (2010) 6(2) *Security Challenges* 19-25.
- The underlying message from the 2010 Rudd government White Paper is that the terrorist threat has become a "persistent and permanent feature of Australia's security environment' and an attack 'could occur at any time'

- It remains questionable whether the small number of 'extremists' who are ready to employ violence can be considered an unprecedented threat to Australia's national security
- In comparison to other risks, terrorism is a triviality → It is still more likely to get killed by bee stings or DIY accidents than being killed in a terrorist attack
- Australian statistics… The fatality risk of being killed in a terrorist act stands at 1 in 7,100,000
  - By comparison, the risk of getting killed in a traffic accident amounts to 1 in 15,000 (yet many Australian roads remain in shocking conditions)
- Terrorism is continually sold as a defining threat to Australia's security however compared to other risks, terrorism is negligible

Andrew Zammit, Australian Foreign Fighters: Risks and Responses, Lowy Institute, April 2015, 2-11.
- The foreign fighter mobilisation in Syria and Iraq does pose a serious national security threat to Australia
  - 'Foreign fighter' refers to persons who join insurgencies outside of their countries of residence
- A major concern for Western governments is that fighters from Middle East and North Africa will return and carry out terrorist attacks at home
  - Most foreign fighters however do not prove a threat on return
    - Paradoxical threat of governments – Most foreign fighters do not prove a threat on return, but those who do are highly dangerous and have been involved in a substantial proportion of the domestic jihadists plots in the west (including the 2005 London bombings)
- Australia has had a persistent, although relatively minor, history of jihadist foreign fighter activity
  - Until 2012, most Australian foreign fights were not involved in actual combat (they tended only to train or be involved in support activities such as facilitation)
- The returning foreign fighter threat to Australia may not turn out to be as great as feared
  - Past cases indicate that those foreign fighters who receive training but see little actual combat tend to be more likely to attempt attacks on return than jihadist combat veterans → It would be more concerning for domestic security if Australians were quietly training in Syria and Iraq and returning home unnoticed
- Australia needs a wide range of tools to tackles the foreign fighter threat because imprisonment, while often necessary, is not a cure-all

Bernard Keane, "The Real Threat of Terrorism to Australians, By the Numbers", Crikey, 4 September 2014.

- Terrorism kills fewer Australians than even the most exotic causes of death, yet we're obsessed with it
- Since the 1978 Hilton Hotel bombing in Sydney, there have been 113 Australian victims of terrorism
  - During the period 2003-12, there have been 2617 homicides in Australia, or around 23 times the number of all victims of terrorism since 1978.
  - There have been over 8500 victims of car accidents (just car accidents, not pedestrian deaths or accidents involving other types of vehicles).
  - There have been over 22,800 suicides in that time.
  - 230 people died from falling off ladders
  - 190 Australian died from accidental gun discharges
  - 206 died from electrocution
  - Between 700 and 1000 women and children have been killed by their partners or parents in domestic homicides
- The global terrorism database shows that the average casualties of all terrorist attacks, including perpetrators, is 2.25 → Around half of all terrorist attacks since 1970 haven't inflicted any casualties
- Even with the most pessimistic assumptions about possible casualties, history suggests terrorism would still rank below some of the more obscure causes of ordinary deaths of Australians
  - Many other things that we can also prevent kill many more of us, and particularly target people the media and politicians have less interest in, like indigenous people, the elderly or victims of domestic violence

Grossman M and Tahiri H 2015, 'Community perceptions of radicalisation and violent extremism: an Australian perspective', *Journal of Policing, Intelligence and Counter Terrorism*, vol 10, issue 1, 14-24

- Aims of study – Explore community perceptions of the underlying drivers for radicalisation and extremism; the perceived impact of radicalisation and extremism on sense of community and social harmony and cohesion; and to investigate community approaches to and solutions for eliminating or reducing the threat of violent extremism in Australia (p. 15)
- Muslim and non-Muslim community members are in a strong position to assist in identifying the drivers of, and potential strategies to prevent or mitigate, the development and impacts of radicalisation and extremism within Australia (p. 15)
- A convergence of personal, sociocultural and political factors were needed to understand the many different pathways by which an individual or a group begins the journey towards radicalisation or extremist thought and action
- There is a belief that the prospect of home-grown terrorism in Australia was fairly low (p. 17)

- o Too strong a focus on the potential for home-grown extremism and terrorism through counter-narrative and public information campaigns can risk further eroding what many participants identified as an already fragile sense of social cohesion and intercultural harmony (p. 17)
- Muslim and non-Muslim participants thought that Muslim communities can and should play a pivotal role in speaking up and out in condemning extremist violence and in promoting a clearer understanding of Islamic religion, law and culture for non-Muslim Australians (p. 18)
  - o Muslim religious leaders in particular were expected to play a critical role and have a stronger voice in this space.
    - § INVOLVING MUSLIM COMMUNITY LEADERS IS ESSENTIAL TO PROMOTE DIVERSITY AND SOCIAL PARTICIPATION
- Study showed a there was a marked call for stronger steps to be taken to enhance cooperation between Muslim communities and government agencies in countering radicalisation and extremism (p. 21)
  - o Well defined partnerships both between Muslim and non-Muslim communities, and also between communities and local, state and federal levels of government should be developed (p. 21)
  - o Government agencies needed to acknowledge the power of communities to drive change, to respect communities and to explicitly acknowledge their contributions → Communities also need to understand government concerns and where government is 'coming from' more generally (p. 21)
- <u>Conclusion</u> - Community members in any national or transnational context are in a strong position to assist in the identification of, first the factors that can contribute to radicalisation, extremism and terrorism